United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 17-1773**
	)	**Issued: May 24, 2018**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Richmond, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 15, 2017 appellant, through counsel, filed a timely appeal from a June 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established that the acceptance of her claim should be expanded to include aggravation of degenerative disc disease with a possible preexisting disc herniation and left radiculopathy with bowel and bladder dysfunction causally related to her January 27, 2000 employment injury.[3]

FACTUAL HISTORY

On February 4, 2000 appellant, then a 48-year-old sales clerk, filed a traumatic injury claim (Form CA-1) alleging that, on January 27, 2000, she injured her back, left hand, and buttocks when she slipped and fell on ice. She stopped work on January 27, 2000 and returned to her usual employment on February 2, 2000. OWCP accepted the claim for back contusion, herniated disc at L4-5, and lumbar spondylosis.

Appellant received treatment following her injury from Dr. Paul P. DiMartino, a Board-certified orthopedic surgeon. On January 27, 2000 Dr. DiMartino noted that she denied a "change in bowel or bladder habits" or radiating pain or loss of sensation into the legs. He diagnosed a lumbosacral strain/contusion subsequent to a fall. In a February 23, 2000 report, Dr. DiMartino noted that appellant had pain in her low back and left buttock without changes in lower extremity motor or sensory function. He recommended a bone scan.

A bone scan obtained on March 9, 2000 revealed a history of appellant sustaining a back injury several years ago and a recent fall. It revealed no abnormality in the lumbar spine, pelvis, or bilateral hips. A lumbar magnetic resonance imaging (MRI) scan dated April 26, 2000 demonstrated mild bilateral foraminal stenosis at L4-5 with no definite disc herniation and a questionable hemangioma at L2.[4]

On April 10, 2000 Dr. DiMartino noted that appellant denied change in bowel or bladder activities or in the lower extremity sensory or motor function. He recommended an MRI scan of the lumbar spine. Dr. DiMartino, on May 1, 2000, related that he was treating appellant after a "fall occurring on January 27, 2000 with the complaint of low back and left leg pain." He indicated that she denied changes in her bowel and bladder function. In progress notes dated June 5, 2000 through July 23, 2001, Dr. DiMartino discussed his treatment of appellant for pain in her low back

[3] In the June 15, 2017 decision, now on appeal, an OWCP hearing representative affirmed an October 25, 2016 decision denying appellant's request to expand the acceptance of her claim to include the above-noted additional conditions and a January 5, 2017 schedule award decision granting her 15 percent permanent impairment of each lower extremity. The hearing representative noted that appellant now concurred with the schedule award decision and appellant's application for review (Form AB-1) notes only her disagreement with OWCP's denial of expansion of the acceptance of her claim. As appellant does not seek an appeal of the schedule award decision, that issue is not presently before the Board. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

[4] A computerized tomography scan dated May 30, 2000 showed a central and left-sided disc herniation at L4-5 and a small hemangioma at L2. A July 7, 2000 MRI scan revealed mild diffuse disc bulging at L4-5 and mild left neural foraminal stenosis. A July 7, 2000 MRI scan study revealed mild diffuse disc bulging at L4-5 and mild left neural foraminal stenosis.

and left leg subsequent to her January 27, 2000 fall.[5] He noted no complaints of a loss of bowel or bladder function.

On December 13, 2001 Dr. DiMartino indicated that appellant's back and left leg pain with numbness in the foot had worsened a couple of weeks ago and recommended diagnostic testing. A December 20, 2001 MRI scan of the lumbar spine revealed a left-sided disc herniation at L4-5 and a small left-sided disc herniation at L5-S1. On February 8, 2002 Dr. DiMartino performed a left L4-5 discectomy. OWCP paid appellant wage-loss compensation for disability from March 11 to May 18, 2002.

In a June 27, 2002 report, Dr. DiMartino discussed appellant's history of back pain that "progressed to back and left leg pain. An extensive workup failed to reveal significant pathology involving the lumbar spine though she had a disc protrusion with degeneration at L4-5." Dr. DiMartino noted that appellant's symptoms increased and she began to have left foot numbness in December 2001 with findings that were "consistent with that of an L5 radiculopathy." He advised that appellant's work injury caused her herniated disc and need for surgery.

On July 11, 2003 appellant retired on disability.

Dr. DiMartino, in progress reports dated 2003 and 2004, discussed his treatment of appellant. Appellant did not complain of an alteration in her bowel and bladder habits.

On January 31, 2005 OWCP referred appellant to Dr. Gordon Vincent Dalton, a Board-certified orthopedic surgeon, for a second opinion examination. In a February 16, 2005 report, Dr. Dalton noted the January 27, 2000 employment injury and her subsequent medical treatment.[6] On examination he found normal motor function and sensation with "exquisite tenderness to light touch" of the low back. Dr. Dalton opined that his findings were "completely unreliable with multiple positive Waddell signs." He diagnosed chronic low back pain beginning in 1997 with "a documented left[-]sided L4/5 disc herniation prior to her fall…." Due to symptom magnification, Dr. Dalton could not determine if there were any objective findings. He opined that all symptoms predated the January 27, 2000 work injury and that any limitations or disability resulted from preexisting problems. In an April 14, 2005 work restriction evaluation, Dr. Dalton asserted that appellant could return to her usual duties without limitations.

Dr. Cletus Aralu, a neurologist, began treating appellant for low back pain on October 13, 2004. He obtained a history of her experiencing a fall at work in 2000 and also noted that she sustained low back pain at work in 1997. Dr. Aralu provided numerous diagnoses, including chronic low back pain due to degenerative joint disease, radiculopathy, bilateral carpal tunnel syndrome, polyneuropathy, and degenerative disc disease.

[5] By decision dated August 16, 2001, OWCP found that appellant had not established a recurrence of disability due to her January 27, 2000 work injury. On November 8, 2002 it modified its August 16, 2001 decision and accepted that she sustained lumbar spondylosis and an L4-5 disc herniation with resulting disability from work for the period January 31 to February 20, 2001.

[6] By decision dated March 26, 2004, OWCP denied appellant's request to expand the acceptance of her claim to include an injury to her hand or wrist causally related to her January 27, 2000 employment injury.

On May 11, 2006 OWCP referred appellant to Dr. Terry Whipple, a Board-certified orthopedic surgeon, for a second opinion examination. On May 30, 2006 Dr. Whipple discussed her history of work injuries in 1997 and 2000. He related that after a February 8, 2002 discectomy appellant had improvement in bowel and bladder symptoms. On examination Dr. Whipple found that she displayed "theatrical behaviors on attempts to follow commands showing inconsistent and nonanatomic variations." He indicated that appellant had a positive straight leg test on the right and 4/5 strength testing of the lower extremities "with inconsistent effort." Regarding the conditions caused or aggravated by the January 27, 2000 employment injury, Dr. Whipple related:

> "Herniation of the L4-5 disc to the left was accelerated or aggravated by the backwards fall on the ice [on] January 27, 2000. Degenerative disc disease was already present at the time of the accident, possibly even with left herniation as per December 8, 1998 comparison report, but without radiculopathy or bowel/bladder dysfunction. Additionally, bilateral carpal tunnel syndrome was aggravated by the accident, sustained only by history according to the information contained in the medical records provided."

Dr. Whipple opined that appellant's lumbar and cervical degenerative disc disease with secondary spondylosis, right ureteral stone, right trigger thumb, depression, polyneuropathy, and possible complex regional pain syndrome was unrelated to her January 27, 2000 employment injury. He asserted that the "aggravation of the L4-5 ruptured disc to the left due to the accident has apparently resolved. Symptoms on the right are related to the preexisting degenerative disc disease and are not considered related to the subject accident." Dr. Whipple related:

> "[Appellant's] injury resulted in aggravation of a degenerative disc condition, possibly with preexisting herniation, causing left radiculopathy and bowel and bladder dysfunction. The left radiculopathy has resolved. The subsequent right radiculopathy was related to the preexisting condition, not the aggravation of the accident. The persistent bowel and bladder symptoms are unreliable and cannot be related to the accident with any certainty."

Dr. Aralu continued to provide progress reports describing his treatment of appellant for back pain. On September 27, 2006 he noted that she went to a hospital for a back infection. Dr. Aralu diagnosed complex regional pain syndrome, chronic pain syndrome, lumbar stenosis, a herniated nucleus pulposus, and polyneuropathy. In an October 11, 2007 report, he noted treating appellant for "numbness, tingling sensation, and pain of the extremities."

On April 23, 2008 Dr. Aralu evaluated appellant for back pain and noted that she "did have some incontinence, but it is not as bad." On July 23, 2008 he discussed her complaints of bowel and bladder incontinence. Dr. Aralu provided numerous diagnoses, including complex regional pain syndrome, gait disorder, lumbar stenosis, a herniated nucleus pulposus, and discogenic disc disease. He provided progress reports describing his treatment of appellant from 2008 through 2015 for various conditions, including chronic low back pain and radiculopathy.

Appellant, on June 11, 2015, filed a claim for compensation (Form CA-7) for a schedule award. In a December 11, 2015 decision, OWCP denied her schedule award claim as she had not submitted an impairment evaluation to support her claim.

Appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. During the telephone hearing, held on September 13, 2016, she related that she experienced difficulty with her bowel and bladder that had improved after the back surgery. Appellant now experienced problems on her right side.

On September 15, 2016 counsel requested that OWCP expand acceptance of appellant's claim based on report of Dr. Whipple to include an aggravation of a degenerative disc condition with possible preexisting herniation causing left radiculopathy and dysfunction of the bowel and bladder.

In a decision dated October 25, 2016, OWCP denied appellant's request to expand the acceptance of her claim to include additional conditions. It found that Dr. Whipple opined that the aggravation of the left disc rupture at L4-5 and the aggravation of a degenerative disc condition had resolved and that her bowel and bladder symptoms were not reliable and could not be definitely related to her injury.

On November 1, 2016 counsel requested a telephone hearing regarding the October 25, 2016 decision.

A telephone hearing was held on May 11, 2017 regarding OWCP's denial of claim expansion. Appellant testified that she had no bowel or bladder control. The initial surgery helped, but after a period of time her bowel and bladder problems began again. Counsel asserted that Dr. Whipple's report supported claim acceptance expansion.

In a progress report dated July 14, 2016, received by OWCP on May 19, 2017, Dr. Aralu noted that appellant had chronic low back pain as a result of a work injury and also radiculopathy, neuropathy, a sleep disorder, and other conditions. He noted that she did not complain of incontinence. On February 13, 2017 Dr. Aralu again discussed his treatment of appellant for employment-related low back pain and other conditions and found no complaints of incontinence.

By decision dated June 15, 2017, an OWCP hearing representative affirmed the October 25, 2016 decision. She noted that appellant no longer challenged the schedule award decision. The hearing representative found that Dr. Whipple listed no objective findings, found that the degenerative disc disease was preexisting, and opined that any aggravation had resolved. She determined that appellant had not submitted any reasoned opinion relating her incontinence to her work injury.

On appeal counsel asserts that OWCP should have accepted additional conditions as employment related.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[7] To establish causal relationship between the condition,

[7] *See V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

ANALYSIS

OWCP accepted that appellant sustained a back contusion, a herniated disc at L4-5, and lumbar spondylosis due to a January 27, 2000 employment injury. Appellant stopped work on January 27, 2000 and resumed her usual employment on February 2, 2000. In 2003, she retired on disability. In September 2016, appellant requested expansion of the acceptance of her claim to include an aggravation of a degenerative disc condition with possible preexisting herniation causing left radiculopathy and dysfunction of the bowel and bladder.

On May 30, 2006 Dr. Whipple found that appellant showed theatrical behavior on examination with inconsistent effort. He opined that she sustained a left herniated disc at L4-5 due to her January 27, 2000 fall and that she also had lumbar and cervical degenerative disc disease with spondylosis unrelated to her work injury. Dr. Whipple indicated that the employment injury caused an aggravation of the degenerative disc condition and possible preexisting disc herniation causing radiculopathy on the left and bowel and bladder dysfunction. He further related that the bowel and bladder symptoms were "unreliable and cannot be related to the accident with any certainty."

The Board finds that Dr. Whipple's report is insufficient to warrant expanding acceptance of appellant's claim. Dr. Whipple found that she sustained an aggravation of degenerative disc disease and a possible preexisting disc herniation causing left radiculopathy and bowel and bladder dysfunction. OWCP accepted that appellant sustained a herniated disc at L4-5 for which she underwent surgery on February 8, 2002 and paid her for disability subsequent to the surgery from March 11 to May 18, 2002. Dr. Whipple opined that any aggravation of left radiculopathy had resolved and that her right radiculopathy was unrelated to the January 27, 2000 employment injury. He also maintained that appellant's symptoms of bowel and bladder dysfunction were not reliable and could not be attributed to the work injury with any certainty. Dr. Whipple's opinion is thus insufficient to support that she sustained additional medical conditions due to her accepted work injury.

Additionally, the remaining medical evidence fails to support expansion of the acceptance of appellant's claim. As noted, where a claimant alleges that a condition not accepted or approved

[8] *See M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

[9] *See John W. Montoya*, 54 ECAB 306 (2003).

[10] *See H.H.*, Docket No. 16-0897 (issued September 21, 2016); *James Mack*, 43 ECAB 321 (1991).

by OWCP was due to his or her employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[11]

Dr. DiMartino treated appellant after her injury. In progress reports dated January 27, 2000 to July 23, 2001, he discussed his treatment of her for pain in the low back and left leg. Appellant did not complain of any bowel or bladder dysfunction. On February 8, 2001 Dr. DiMartino performed a left discectomy at L4-5. He continued to treat appellant until 2004. In his progress notes, Dr. DiMartino found no bowel or bladder dysfunction or an aggravation of a degenerative disc condition due to her accepted work injury and thus his opinion is of little probative value.

Dr. Aralu treated appellant beginning in 2004.[12] He provided progress reports containing numerous diagnoses, including complex regional pain syndrome, gait disorder, lumbar stenosis, a herniated disc, and discogenic disease. Dr. Aralu did not describe complaints of bowel or bladder incontinence until 2008 and did not attribute the complaints to the accepted work injury or otherwise address causation. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[13]

In progress reports dated July 14, 2016 and February 13, 2017, Dr. Aralu indicated that he was treating appellant for chronic low back pain due to a work injury and for other conditions, including radiculopathy and neuropathy. He did not attribute any condition other than low back pain to the work injury and thus his reports are insufficient to meet her burden of proof.

The Board, consequently, finds that appellant has not met her burden of proof to establish that the acceptance of her claim should be expanded to include additional employment-related conditions. Appellant has not submitted evidence from a physician who, based on an accurate factual history, explained with supporting medical rationale that the additional conditions were causally related to the accepted work injury.[14]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that the acceptance of her claim should be expanded to include aggravation of degenerative disc disease with a possible preexisting disc

[11] *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

[12] On February 16, 2005 Dr. Dalton, an OWCP referral physician, found unreliable findings on physical examination such that he was unable to determine whether appellant had any objective findings. He opined that she could resume her usual employment.

[13] *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[14] *See R.R.*, Docket No. 17-0799 (issued October 20, 2017); *G.C.*, Docket No. 13-0583 (issued May 17, 2013).

herniation and left radiculopathy with bowel and bladder dysfunction causally related to her January 27, 2000 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 24, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board